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No. 84-143

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

vs.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RENEWED MOTION TO DISMISS AS TO APPELLANTS SULLIVAN AND ANDREWS

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PROPERTIES, INC., a Washington Corporation; SPOKANE ARCADES, INC., a Washington Corporation; THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; MADRONA PUBLISHERS, INC., SUPERIOR PUBLISHING COMPANY; WASHINGTON LIBRARY ASSOCIATION; PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION; MOTION PICTURE EXHIBITORS OF WASHINGTON, ALASKA, AND NORTHERN IDAHO; WASHINGTON STATE COUNCIL OF TEACHERS OF ENGLISH; WASHINGTON LIBRARY MEDIA ASSOCIATION; and THE COMMUNITY COLLEGE LIBRARIAN AND MEDIA SPECIALISTS ASSOCIATION OF WASHINGTON.

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Appellee J-R Distributors, Inc. respectfully renews its motion to dismiss the appeals of appellants Jeffrey C. Sullivan and Fred Andrews on the ground of their having been instituted by an untimely

filed joint notice of appeal, thereby depriving this Court of jurisdiction. Supreme Court Rule 16.1(a).

STATEMENT OF FACTS

On or about August 7, 1984 appellees filed a document in this Court entitled "Motion to Dismiss or Affirm." This Motion was made on behalf of all appellees and sought affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit as to all appellants. However, at page 2 of the Motion to Dismiss or Affirm, appellee J-R Distributors, Inc. individually moved to dismiss the appeals of appellants Jeffrey C. Sullivan (Prosecuting Attorney for the County of Yakima, State of Washington), and Fred Andrews (City Attorney for the City of Yakima, State of Washington) on the ground that these two appellants had failed to file a timely notice of appeal.

On October 1, 1984, this Court noted probable jurisdiction over the appeals filed in No. 84-28 [Brockett v. Spokane Arcades, Inc., et al.] and No. 84-143 [Eikenberry et al. v. J-R Distributors, Inc., et al.]. However, the Court's order did not specifically mention the included motion to dismiss on jurisdictional grounds as to appellants Andrews and Sullivan only. Counsel has been advised by this Court's staff that renewal of the motion solely as to appellants Andrews and Sullivan would not be inappropriate.

Appellants Andrews and Sullivan are defendants in only one of the seven District Court actions which were appealed to the Ninth Circuit Court of Appeals. The only plaintiff in that action is appellee J-R Distributors, Inc. The Ninth Circuit's judgment is now on appeal to this Court.

Appellants Andrews' and Sullivans' appeals were apparently docketed with those of other appellants in No. 84-143.

In appellees' previously filed Motion to Dismiss or Affirm, they pointed out that the Court of Appeals entered its judgment on February 6, 1984 [see Exhibit "C-1" of appellant Eikenberry's Jurisdictional Statement] and its order denying rehearing on April 6, 1984 [see Exhibit "D-1" of appellant Eikenberry's Jurisdictional Statement]. [Pursuant to Rule 11.3 of this Court, the time for filing the notice of appeal in the Court of Appeals "runs from the date of the denial of rehearing" in a case, such as the present one, where a rehearing had been requested.]

As appellees pointed out at p. 2 of their Motion to Dismiss or Affirm, appellants Sullivan and Andrews jointly prepared a notice of appeal which was not filed in the Court of Appeals until July 9, 1984, 94

days after the date on which the Ninth Circuit denied the Petition for Rehearing. [A copy of the Notice of Appeal filed by appellants Sullivan and Andrews appears in the Joint Appendix at p. 75. Although the date of filing in the Court of Appeals does not appear on the face of this copy, all parties agree that this Notice of Appeal was filed in the Court of Appeals on July 9, 1984 -- see p. 2 of the Brief For Appellants Eikenberry, et al.] Neither Mr. Sullivan nor Mr. Andrews has sought relief from their untimely joint filing.

Although appellants Sullivan and Andrews did not file their own Jurisdictional Statements or Opening Briefs, their

names appear (inconsistently [1/]) in the briefing filed by Attorney General Eikenberry in No. 84-143.

[1/] At p. 31 of Brief for Appellants Eikenberry, et al., some confusion on this point was created by including the words "Jeffrey C. Sullivan ... for Fred Andrews" [emphasis added] under the heading "Additional Appellants," thereby creating the erroneous impression that Mr. Sullivan is in fact neither a defendant nor an appellant herein. In fact, both Mr. Sullivan and Mr. Andrews were named as defendants in appellee J-R Distributors' complaint [see p. 29 of the Joint Appendix] and, as noted above, both joined in the filing of the untimely Notice of Appeal herein at issue.

Confusion also has been caused by the fact that the Jurisdictional Statement filed in No. 84-143 lists Mr. Sullivan as one of the "Additional Appellants" but entirely omits any reference to Mr. Andrews. Arguably, an additional ground for dismissal exists as to appellant Andrews because no jurisdictional statement was ever filed on his behalf.

THE FILING OF THE UNTIMELY NOTICE OF APPEAL IN NO. 84-143 BY APPELLANTS SULLIVAN AND ANDREWS DEPRIVES THIS COURT OF JURISDICTION TO CONSIDER THEIR APPEALS AND COMPELS AN ORDER OF DISMISSAL AS TO THEM.

The filing of a timely Notice of Appeal is a necessary prerequisite to the exercise of this Court's jurisdiction. In pertinent part, Article III, § 2, ¶ 2 of the United States Constitution provides:

> "[T]he Supreme Court shall have appellate jurisdiction ... under such regulations as the Congress shall make."

In 28 U.S.C. § 2101(c) Congress expressly provided that this Court's appellate jurisdiction may only be invoked where a notice of appeal is timely filed within 90 days of the decision below.

> "Any other appeal ... intended to bring any judgment or decree in a civil action ... before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree." (Emphasis added.)

Congress' use of the word "shall" in the statutory provision quoted above clearly indicates that the 90 day time period was intended to be mandatory and jurisdictional.

The comparable congressional provisions for the time to file notices of appeal to Courts of Appeals from final District Court judgments have been uniformly construed as imposing an absolute jurisdictional bar in cases where a notice of appeal is filed beyond the statutorily designated time period. See Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264 (1978) and the numerous cases there cited. This same Congressionally imposed time limit for the filing

of a Notice of Appeal was most recently construed by this Court in Griggs v. Provident Consumer Discount Co., __ U.S. __, 103 S.Ct. 400 (1982). In that case, this Court held that "[t]he filing of a notice of appeal is an event of jurisdictional significance" [__ U.S. at ___, 103 S.Ct. at 402] and concluded by stating:

> "It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.' Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 264 (1978)." Griggs, supra, __ U.S. at __, 103 S.Ct. at 403.

Although there is little case law arising directly under 28 U.S.C. § 2101(c), this Court held that the time limits imposed for the taking of an appeal to this Court under the predecessor statute to 28 U.S.C. § 2101 were indeed jurisdictional and that the failure to comply with them required dismissal of the appeal. Whitsitt

v. Union Depot & R. Co., 122 U.S. 363 (1887).

Furthermore, the time for filing a notice of appeal to this Court may not be extended. This provision is expressly set forth in Rule 11.4 of this Court and is necessarily implied in the language of 28 U.S.C. § 2101(c). After providing that an appeal "shall be taken or applied for within ninety days after the entry of ... judgment," the statute provides: "A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days." The statute's failure to contain a comparable provision regarding the time for taking appeals is necessarily dispositive of the question of Congress' intent.

Finally, this Court also necessarily lacks jurisdiction to treat the untimely notice of appeal as a timely petition for

certiorari. Just as 28 U.S.C. § 2101(c) sets forth the constitutionally imposed jurisdictional limitations upon this Court's appellate power, so does it also set forth the jurisdictional limitations upon this Court's exercise of its certiorari power.

While 28 U.S.C. § 2101(c) provides that "[a] justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days", this provision can be of no avail to appellants Andrews and Sullivan because they never sought an extension nor have they demonstrated "good cause" for their late filing. Absent the filing of such a statutorily required showing of "good cause," the filing of a certiorari petition within the required 90 days is mandatory and jurisdictional. 28 U.S.C. § 2101(c). See, e.g.: Rust Land and Lumber Company v.

Jackson, 250 U.S. 71, 76 (1919) and Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 417-418 (1923)

It is respectfully submitted that this Court is juridictionally precluded from taking any further steps in these actions regarding appellants Sullivan and Andrews other than to dismiss their appeals as having been initiated by an untimely filed joint notice of appeal.

CONCLUSION

For the foregoing reasons, the appeals of appellants Sullivan and Andrews should be dismissed as having been instituted by an untimely filed joint notice of appeal.

DATED: January 3, 1985

Respectfully submitted,

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